



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

June 25, 2013

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: *D.R. Horton, Inc. v. NLRB*, No. 12-60031

Dear Mr. Cayce:

Pursuant to Rule 28(j), the Board contests the assertion, in Horton's June 24 letter, that *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 2013 WL 3064410 (June 20, 2013), effectively disposes of this case. *American Express* does not consider, much less resolve, the key issues before this Court.

The Board held that the disputed arbitration agreement here is invalid because it expressly restricts employees' substantive federal right, under Section 7 of the NLRA, to pursue work-related claims concertedly in a judicial or arbitral forum. *See* D&O 4-5. Like all other Supreme Court decisions addressing the contours of the FAA (*see* Board Br. 35), *American Express* does not address that core NLRA right.

Because the Board's rationale is based on the agreement's direct restriction of the principal substantive right the NLRA was enacted to protect, the question before the Court is not, as it is in cases like *American Express*, whether a statute's creation of explicit causes of action implicitly entails a subsidiary entitlement to particular litigation (or arbitration) procedures. *See* Board Br. 36-37 & n.66. Likewise, because the Board's decision is based on employees' Section 7 right to concerted action, not on Federal Rule of Civil Procedure 23 (D&O 1, 3-4, 10; *see also* Board Br. 17-18), it is unaffected by the Supreme Court's holding that Rule

23 does not create an entitlement to class-action procedures or undermine the effectiveness of individual litigation.

Finally, contrary to Horton's assertion, the Board did not apply the effective-vindication exception to the FAA and its holding does not depend on whether an employee can effectively vindicate his underlying federal statutory claim. *See* D&O 10 & n.23, Board Br. 38-39. Accordingly, the Supreme Court's narrowing of the effective-vindication exception, to invalidate only agreements that curtail a party's right to pursue a federal remedy, is inapposite.

Respectfully submitted,

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cc: Counsel of record (by the Court's electronic filing system)